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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the lower courts acted within their discretion in refusing to terminate remedial educational improvement programs as "unitary" where the same courts had properly refused to do so in the previous year and where the State defendants seeking such termination the second time neither moved the trial court for a declaration of partial unitary status nor offered any significant additional evidence even attempting to satisfy their burden, articulated by this Court in *Freeman v. Pitts*, to prove that (1) the vestiges of segregation which such programs were designed to remedy had been eliminated to the extent practicable; (2) a release of jurisdiction in these areas would not have adverse consequences on other admittedly non-unitary aspects of the school system; and (3) the defendants had demonstrated a good faith commitment to their constitutional obligations.

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BRIEF IN OPPOSITION OF RESPONDENTS

COUNTERSTATEMENT OF THE CASE

The Court described the background of this case in *Missouri v. Jenkins*, 495 U.S. 33, 37-45 (1990). The Court also recently granted *certiorari* in *Missouri v. Jenkins*, 11 F.3d 755 (8th Cir. 1993), *cert. granted*, 62 U.S.L.W. 3794 (U.S. Sept. 16, 1994) (No. 93-1823). Both that Petition and this one involve attempts by the State of Missouri (the "State") to terminate prematurely educational improvement elements of the desegregation remedy for Kansas City, Missouri public school students. These educational programs are integral parts of a remedy that the lower courts have found is working, but has not yet eliminated to the extent practicable the vestiges of more than a century of racial segregation that the State mandated in the Kansas City, Missouri School District ("KCMSD" or the "District"). *See, e.g.*, App. 5-7, 16-

17.[1] The State has brought this issue before the district court and the Eighth Circuit twice now, and the lower courts both have concluded twice that the State has failed to meet, indeed in most respects failed even to address, its burden of proving partial unitary status.

The State, however, does not ask this Court in the present Petition to review the mundane factual issue of the inadequacy of its proof, but rather the dramatic-sounding legal question of whether a federal court may order a perpetual remedy in a school desegregation case. Pet. i. This question, however, is not presented by the decisions below, which ordered no such thing. Rather, the question presented here, as in No. 93-1823, is whether the lower courts properly concluded that the educational programs should not be terminated as "unitary," because of the unchallenged facts: (1) that vestiges of segregation remain and can practicably be remedied; (2) that the termination of these programs would make it impossible for the defendants to comply with orders in other areas that the State has admitted are not unitary; and (3) that the State has made no showing of its good faith commitment to the district court's orders. App. 5-7. As a result, this Court should not grant *certiorari* here but, at most, hold this Petition pending the disposition of No. 93-1823.

THE PRIOR PROCEEDINGS

The State's Petition arises from its opposition to the District's motion to continue for the 1993-94 and 1994-95 school years a series of educational programs that were part of the district court's original remedy in this case. The remedy was ordered because, in September 1984, after a 92-day trial, the district court (The Honorable Russell G. Clark) found both the State and the District

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[1] In this opposition, we cite the Petition as "Pet."; the Appendix attached to the Petition as "App."; the Appendix attached to this opposition as "Opp. App." and the Appendix attached to the Petition in No. 93-1823 as "93 App."

liable for unconstitutionally segregating the schools of KCMSD for a century and for failing for three decades in their affirmative duty to undo the harm of that segregation. Judge Clark found that the "inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District," and that State-mandated segregation has resulted in the continued racial isolation of minority students. *Jenkins v. Missouri*, 593 F. Supp. 1485, 1492-93 (W.D. Mo. 1984).

Judge Clark recognized "the frequent admonition from the Supreme Court to tailor the remedy to fit the scope of the violation," June 5, 1984 Order at 97, and that "the goal of a desegregation decree . . . is the elimination of all vestiges of state imposed segregation." *Jenkins v. Missouri*, 639 F. Supp. 19, 23 (W.D. Mo. 1985), *aff'd as modified*, 807 F.2d 657 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987). The most important vestiges he found were "a system wide *reduction* in student achievement in the schools of the KCMSD," *id.* at 24 (emphasis in original); "low achievement" and a "general attitude of inferiority among blacks," 593 F. Supp. at 1492-93; racial isolation in the schools, *id.*; and severe deterioration in the physical conditions of the schools. 639 F. Supp. at 39.[2]

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[2] Many school buildings in the KCMSD had "literally rotted" as a result of the dual system. *Jenkins v. Missouri*, 672 F. Supp. 400, 411 (W.D. Mo. 1987), *aff'd in relevant part*, 855 F.2d 1295 (8th Cir.) (*en banc*), *cert. denied in relevant part*, 490 U.S. 1034 (1989). Moreover, the court found that the lack of revenue that had caused this deterioration flowed directly from the State's failure to remedy its previous unconstitutional segregation: "[T]he State of Missouri by its constitutional violations and subsequent failure to affirmatively act to remove the vestiges of the dual school system certainly contributed to an atmosphere which prevented the KCMSD from raising the funds to maintain its schools." *Id.* at 403. In affirming the latter finding, the Eighth Circuit expressly noted that the State's failure to remedy its unconstitutional conduct fostered further segregation: "The findings of fact demonstrate a spiraling effect of

Judge Clark rejected mandatory busing within or between districts as a remedy for these conditions and found that desegregation in KCMSD could best be accomplished through a largely voluntary desegregation plan based on educational improvements, voluntary student transfers to specialized magnet schools, capital improvements, and voluntary interdistrict transfers. The cornerstone of this voluntary desegregation remedy consisted of the basic educational improvements, known among the parties as *Milliken II* programs because they generally are relief of the type that this Court first expressly approved in *Milliken v. Bradley*, 433 U.S. 267 (1977) ("*Milliken II*"). They include additional teachers to reduce class sizes to appropriate levels, counselors, librarians and library materials to meet State AAA-rating requirements, a full-day kindergarten program, an early childhood education program, an extended school day in selected schools, and a summer school program. The Eighth Circuit has repeatedly recognized that these programs have three complementary goals: (1) to remedy the systemwide reduction in student achievement by improving the education available to the plaintiff school children; (2) to bring about a voluntary redistribution of children within the KCMSD; and (3) to reverse the state-initiated pattern of decreasing non-minority enrollment by attracting back white students who had been driven to attend private and suburban schools as a result of the constitutional violations. *See e.g., Jenkins*, 855 F.2d at 1301-02.

The State did not appeal Judge Clark's determination that the State and KCMSD had failed to remedy the effects of their unconstiutional segregation. Neither did it appeal "substantial portion[s]" of the remedial order, including the implementation of the educational programs designed in part to remedy the systemwide reduction in

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white children leaving KCMSD schools and KCMSD's white constituency withdrawing its financial support from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle." 855 F.2d at 1305.

student achievement in KCMSD. *Jenkins v. Missouri*, 807 F.2d 657, 682 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987).

In the spring of 1992, the plaintiff school children and the KCMSD moved the district court to order the continuation of certain of these educational improvement programs for one year. The State, on the heels of this Court's decision in *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), argued in their brief in response to this motion that these programs should be terminated because each was partially unitary.[3] The State, however, did not file a motion seeking such relief and presented no evidence to the trial court concerning most of the several necessary inquiries described by this Court in *Freeman*, and Judge Clark summarily rejected the State's argument. *See* Opp. Cert. No. 93-1823 at 6-7.[4]

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[3] On the other hand, the State also argued that several of these same programs should be terminated because they were ineffective. The State subsequently stipulated to the scope of the proposals and to the budgets for more than half of the *Milliken II* programs, while reserving its argument that they were "unitary."

[4] While the State's first appeal on the partial unitary status question was pending, Judge Clark held a three-week hearing concerning the proposed continuation of the magnet school component of the remedy. The State did not argue that this component of the remedy was unitary but that it was ineffective. The State presented extensive evidence attempting to demonstrate the desegregative and educational failures of the remedy. Judge Clark, however, found that the progress in desegregating KCMSD's student enrollment has been "substantial." 93 App. 129. He found that KCMSD had eliminated segregation in "all fifteen elementary schools that had suffered the most intense racial isolation," made progress in integrating secondary schools (some of which had "achieved high levels of integration"), and "substantially improved" on an index of desegregation in the schools. *Id.* On the other hand, Judge Clark also concluded that more progress was necessary and practicably attainable. *Id.* Likewise, he specifically found that while "there has been a trend of improvement in academic achievement in the KCMSD," the District has not made sufficient progress. 93 App. 131.

On appeal, the Eighth Circuit affirmed on the ground that the State had failed to meet its burden of proving several of the prerequisites to a declaration of partial unitary status. *Jenkins v. Missouri*, 11 F.3d at 765; 93 App. 19. The court concluded that the "evidence on the record fell far short of establishing that such vestiges had been eliminated to the extent practicable." *Id.* The Eighth Circuit identified two other reasons why the States was not yet entitled to be released from its obligations. It had failed to meet, indeed failed even to address, two other criteria set forth by this Court in *Freeman*: "whether retention of judicial control [over the educational improvement programs] was necessary or practicable to achieve compliance with the decree in other facets of the school system," and whether "[t]he State . . . has demonstrated a good faith commitment to the whole of the court's decree." *Id.* In the spring of 1994, the Eighth Circuit denied the State's petition for rehearing *en banc* of this appeal. Even the dissenters from this denial noted that at most a remand would be appropriate because of the State's lack of proof on critical issues: "Whether the KCMSD has actually achieved partial unitary status in the quality of its educational program imposed by the desegregation plan is, perhaps, *still an open question on the record before us today.*" *Jenkins v. Missouri*, 19 F.3d 393, 400 (8th Cir. 1994); 93 App. 58 (emphasis added). This Court granted a writ of *certiorari* last month in No. 93-1823 to review those decisions.

In the meantime, in the spring of 1993, the plaintiffs and KCMSD again sought a further continuation of many of the same basic educational improvement programs for a discrete two-year period, the 1993-94 and 1994-95 school years.[5] The State again opposed this request, claim-

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[5] In 1994, the plaintiffs and the District sought to renew the remainder of these programs for the 1994-95 school year. The Court again held an evidentiary hearing and the State again submitted no new evidence in support of its partial unitary status

ing the programs were partially unitary. However, the State "made only minor additions to the record the district court had already considered in earlier orders relating to the quality education issues and to the argument that these programs should be declared unitary under *Freeman*," App. 3, and Judge Clark rejected the State's argument.[6] Judge Clark also pointed out that the State's own arguments and evidence from another hearing only a few months earlier, *see supra* note 4, undermined its unitary status argument and called into question its good faith:

> The *Milliken II* component is an integral part of the overall desegregation remedy and the Court finds that the State's arguments that these components have attained unitary status are unpersuasive. The State should not be heard to complain that the desegregation plan is a complete failure on the one hand and that the *Milliken II* components are completely successful on the other. The Court finds that the State has made fundamentally flawed arguments in pursuit of an order determining unitary status in the KCMSD. The Court does find that the *Milliken II* components have been partially successful in implementing the goals and standards of the desegregation remedy. However, these components have not yet

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argument. The State has not appealed the authorization of those programs for 1994-95.

[6] The State's only affirmative evidence on the *Freeman* issue was an affidavit from the same single witness who had briefly testified in support of partial unitariness at the 1992-93 hearing. This affidavit, a fair summary of *all* the record evidence in support of the *State's* argument, merely reiterates that the various *Milliken II* programs had been "fully implemented," had made more resources available in KCMSD, and in many instances had brought these educational inputs to a level equal to or higher than some neighboring school districts. Opp. App. at 1. The State's affidavit was silent on the State's good faith, the interrelatedness of the various remedial programs, and whether the remedy had succeeded in eliminating the vestiges of segregation to the extent practicable in KCMSD.

> met these goals in their entirety. The Court finds that it would be wholly inappropriate to deem the KCMSD unitary or partially unitary at this time. App. 17.

On appeal, the Eighth Circuit again rejected the State's claim. The court noted that the "State [had] presented no live witnesses on this issue, but filed a declaration from Dr. Terrance Stewart, essentially reiterating his testimony from the earlier hearing." App. 4. *See* Op. App. 1. As a result, the Eighth Circuit concluded unequivocally that its previous ruling in "*Jenkins IX* govern[ed] [its] decision in this case on a record that is essentially identical on the *Freeman* issues." App. 6. The court also discussed the point made by the dissenters from denial of rehearing *en banc*, that the State's suggestion that the fundamental educational improvements accomplished through the *Milliken II* programs in this case be terminated immediately was unrealistic and called into question the State's factually unsupported claim that it had demonstrated its good faith commitment to the courts' decrees.

The State filed this second Petition on its partial unitary status claim before this Court granted *certiorari* in No. 93-1823. The State asserts in this second Petition that the Eighth Circuit's discussion of the circumstances the State should consider in attempting to establish its good faith in subsequent proceedings before the district court creates a distinct issue from those raised in its first Petition. The decisions below, however, raise no such issue; they reach the same unremarkable conclusions about the State's repeated failure to meet its burden of proof, relying upon the State's same sparse record and the same settled legal principles.

REASONS FOR DENYING THE WRIT

Petitioners' stated issue is not raised by this case at all. The State claims that the decisions below require a perpetual remedy as a prerequisite to a declaration of partial unitary status, when in fact the lower courts said no such thing. Rather, the courts below twice carefully applied the standards recently articulated by this Court in *Freeman*, 112 S. Ct. 1430, to the same factual record. Indeed, the challenged decision here, like that already under review in No. 93-1823, held only that the State had failed to meet its burden of proving that the vestiges of segregation addressed by the *Milliken II* relief in this case have "been eliminated to the extent practicable" and that the State "has demonstrated a good faith commitment to the whole of the Court's decree." App. 5-6 (*quoting Freeman*, 112 S. Ct. at 1446). The court explicitly relied on its decision in *Jenkins IX*, 11 F.3d 755; 93 App. 1, noting that the "record now before us relevant to the *Freeman* issue has been supplemented to only a minor degree since" then. App. 6. Therefore, there is no reason for the Court to grant *certiorari* again to review the same issues on an "essentially identical" record. *Id.* Instead, the Court should deny review or simply hold this Petition pending its decision in No. 93-1823, which is already proceeding on an expedited schedule. Indeed, if the Court were to grant *certiorari* on this Petition, briefing and argument on the merits could not proceed on the schedule already ordered in No. 93-1823.

THE PETITION PRESENTS NO NOVEL LEGAL ISSUE OR SPLIT AMONG THE CIRCUITS, BUT INSTEAD INVOLVES FACT-SPECIFIC ISSUES GOVERNED BY SETTLED LEGAL PRINCIPLES THAT THE COURTS BELOW CAREFULLY FOLLOWED

A. The Lower Courts Properly Applied This Court's Standards for the Determination of Partial Unitary Status and Did Not, as the Petitioners Claim, Effectively Impose Permanent Injunctive Relief

No party or court in this case disagrees with the fundamental proposition that federal judicial supervision of public school systems is " 'intended as a temporary measure.' " Pet. 10 (quoting *Board of Education v. Dowell*, 498 U.S. 237, 248 (1991)). The Petitioners misread the decisions below as conflicting with this well-settled principle by effectively mandating perpetual injunctive relief as a prerequisite to a declaration of unitary status. Neither the Eighth Circuit's nor the district court's opinion requires any such thing.[7] Rather, the Petitioners twist the Court of Appeals' language and distort its context in a now redundant attempt to secure this Court's review. The Eighth Circuit's language, its actual context, and the entire record on appeal make clear that the issue purportedly presented by this Petition is a chimera. The State's horrific fantasy of a never-ending remedy cannot alter the inescapable reality that any issues actually presented here are the same as those presented in No. 93-1823.

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[7] Likewise, there is no question but that the consequence of a declaration of unitary status is "the relinquishment of jurisdiction by the courts and the return of autonomy and responsibility" to State and local officials. Pet. 16. Having rejected the State's contention that the KCMSD is partially unitary, the lower courts have not yet had occasion to address the consequences of such a finding. Therefore, Petitioner's recitation of cases supporting this accepted principle is irrelevant. Pet. 16-20.

This Court in *Freeman* authorized district courts to exercise their discretion to withdraw supervision from general areas of school district operations only where: (1) "the vestiges of past discrimination [in that area] have been eliminated to the extent practicable," 112 S. Ct. at 1446 (quoting *Dowell*, 111 S. Ct. at 638); (2) "there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn," *id.*; (3) "retention of judicial control is [not] necessary or practicable to achieve compliance with the decree in other facets of the system," *id.*; and (4) the defendant "has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance." *Id.* The Eighth Circuit's recent decisions both recognize each of these standards and correctly hold that the State failed to carry its burden of proof on three of these four issues. App. 6; 93 App. 19.

The State, however, makes the extraordinary claim that the Eighth Circuit in its second decision *sua sponte* "created a perpetual remedy," although no party asked the district court or the Eighth Circuit to extend the injunctive relief at issue here beyond the current school year. Pet. 10. In the single passage upon which the Petitioners rely exclusively, the panel opinion actually quotes the dissent from the denial of rehearing *en banc*, upon which the State itself relied heavily in its Petition in No. 93-1823. The dissenters wrote that the defendants must ensure that " 'equal opportunity to receive a quality education' should be '*permanently* available to each student in the KCMSD.' " App. 9 (quoting *Jenkins*, 19 F.3d at 404 (emphasis added); 93 App. 67). This dicta, far from mandating perpetual injunctive relief, reiterates the central Fourteenth Amendment holding of *Brown v. Board of Education*, 347 U.S. 483 (1954), that students may not be deprived of equal educational opportunities on the basis of their race:

> Today, education is perhaps the most important function of state and local governments . . . . Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. [*Id.* at 493.]

To say that such equal educational opportunities should be "permanently available" does not mandate either a perpetual judicial remedy or never-ending judicial supervision, but compliance with the essential dictates of the Fourteenth Amendment.

The contexts in which this language appeared originally in the State's first appeal and subsequently in the decision under review further demonstrate the misguided nature of the State's claim that the Eighth Circuit has effectively mandated a perpetual remedy. The supposed "perpetual remedy" language was first used by the dissenters from the denial of rehearing *en banc* in the State's first partial unitary status appeal to explain why even the dissenters would only have remanded the State's request. One of the issues, on which even the dissenters conceded the State had not met its burden of proof, was whether "the State and the KCMSD have an affirmative commitment to continue to provide a nondiscriminatory, quality educational program in Kansas City," *Jenkins*, 19 F.3d at 404; 93 App. 68, the "good faith" prong of the analysis required by this Court in *Freeman* and *Dowell*.

The dissenters' concern, in light of the history of this case, is obvious and well-founded. The State of Missouri not only segregated black students in Kansas City's public schools for a century but then, rather than contributing to an effective remedy after *Brown*, created and perpetuated for three decades a cycle whereby these predominantly black schools were deprived of the resources necessary for adequate operation to the point where student achievement districtwide was reduced and school buildings literally rotted. *See supra* 3. Subsequently, the State for nine year has consistently opposed virtually every reme-

dial effort proposed by the plaintiffs or the KCMSD, while repeatedly refusing to offer the courts any meaningful alternatives. *See, e.g.*, 93 App. 123 ("the State has *never* offered the Court a viable, even tenable alternative and has been extremely antagonistic in its approach to effecting the desegregation of the KCMSD") (emphasis in original); November 12, 1986 at 7 ("during the course of this lawsuit the Court has not been informed of one affirmative act voluntarily taken by the Executive Department of the State of Missouri or the Missouri General Assembly to aid a school district that is involved in a desegration program"). In this context, the question of whether the State planned to "take its money and exit, stage left" and return to its earlier practices was so serious as to give pause to all eleven judges of the Eighth Circuit, including those judges who believed the panel had erred in affirming the district court's decision extending the *Milliken II* relief for the 1992-93 school year without requiring the lower court to hear additional evidence.

When the State appealed the district court's order extending much of this relief for 1993-94 and 1994-95, the Eighth Circuit again rejected the State's appeal for the same reasons it had before. App. 6 ("*Jenkins IX* governs our decision in this case"). The court noted that the State had not supplemented the record in any significant way and specifically reiterated several of the bases for its holding in *Jenkins IX* that the State had not met its burden of proving that KCMSD was partially unitary with respect to educational quality. *Id.* The panel also addressed the concerns raised by the dissenters from the recent denial of rehearing *en banc* in the State's first partial unitary status appeal. The panel explained more explicitly why all eleven judges of the Eighth Circuit had concerns about the State's proposal that these educational programs simply be terminated immediately. App. 8. The panel explained that in the context of this case, in which the State's violations have contributed to the District's inadequate funding, this proposal called into ques-

tion the State's factually unsupported argument "that it has demonstrated its good faith commitment to all of the court's decrees." App. 11. The court below then reminded the State that the question of good faith is a factual question for the district court. The court concluded that the "State has not attempted to make a factual showing on" the issue of its good faith "for determination by the district court." *Id.* This discussion of the "good faith" prong of the *Dowell* and *Freeman* inquiries by no means "creates a perpetual remedy."

The issue before the Eighth Circuit concerned only the 1993-94 and 1994-95 school years. No party had requested relief beyond that time period and the district court had not considered the question. No evidence addressed the question of how the *Milliken II* components would or could be maintained were the KCMSD declared unitary in the area of educational quality.[8] There thus was no basis for the Eighth Circuit to rule on the status of the parties' remedial obligations after 1994-95, and it did not. Instead, having found that the State again had not even tried to prove a history of good faith commitment to the whole of the court's decree, the court suggested in dicta that to demonstrate good faith the State ought to at least consider how the defendants could assure the plaintiff school children of equal educational opportunities regardless of race when court supervision ends.

The legitimate inquiry into that issue, which is necessary to a meaningful determination of "good faith" in this case, is completely consistent with the decisions of this

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[8] Judge Clark has ordered the parties to file financial reports addressing the question of how KCMSD could fund continuation of these programs after withdrawal of court-ordered state funding—an order totally inconsistent with any intention to require the State to fund a "perpetual remedy." App. 9; 93 App. 140-42. A hearing to consider this and other longer term remedial issues is expected within the next year.

Court [9] and of the other circuit courts. The Petitioners, attempting to portray the decision below as creating a split among the circuits, cite decisions from other circuits that are in fact consistent with the decisions below in their legal analysis, but that reflect varying results on the particular facts presented in each.[10] For example, Petitioners cite the decisions on remand from this Court in *Dowell v. Board of Education of Oklahoma City*. Pet. 18-19. The Tenth Circuit in *Dowell*, however, employs precisely the type of good faith analysis that the Eighth Circuit found that the State of Missouri had failed to address here. There the Tenth Circuit analyzed whether the defendant seeking unitary status had (1) operated in "good faith compliance for a reasonable period of time" and (2) was unlikely to "return to its former ways." *Dowell v. Board of Education of Oklahoma City*, 8 F.3d 1501, 1512 (10th Cir. 1993). In *Brown v. Board of*

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[9] The Eighth Circuit's decision "does not contravene decisions of this Court by elevating quality education" to the level of a fundamental constitutional right, as Petitioners suggest. Pet. 20. Instead, the court below reaffirmed that the Fourteenth Amendment may require improved educational quality "to erase the effects of prior school segregation," Pet. 22-23 (quoting *Liddell v. Caldwell*, 546 F.2d 768, 773 n.10 (8th Cir. 1986)), consistent with the Court's decisions in *Milliken II*, 433 U.S. 267 (1977), and *Freeman v. Pitts*, 112 S. Ct. 1430, 1446 (1992).

[10] The two Eleventh Circuit decisions cited by Petitioners do not demonstrate a split in the Circuits but rather the necessarily fact-bound nature of the unitary status inquiry. In two cases "decided eleven days apart," Pet. 19, and employing the same legal standards applied by the Eighth Circuit in the decision below, the Eleventh Circuit reached different results because of differing facts. In *Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416 (11th Cir. 1992) the court reversed a unitariness holding and remanded for a full evidentiary hearing as to unitary status of the defendant school district. On the other hand, in *Lee v. Talladega County Bd. of Educ.*, 963 F.2d 1426 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1257 (1993), the court refused to reopen a desegregation case where the defendant school district had been found, after a hearing meeting the *Freeman* and *Dowell* standards, to be unitary.

Education of Oklahoma, 978 F.2d 585 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2994 (1993), the Tenth Circuit also elaborated the type of proof relevant to *Freeman's* good faith inquiry:

> Mere protestations of an intention to comply with the Constitution in the future will not suffice. Instead, specific policies, decisions, and courses of action that extend into the future must be examined to assess the school system's good faith. [*Brown*, 978 F.2d at 592.]

Likewise, in *Freeman* itself, despite favorable findings by the district court about the defendants' dedication to the remedial efforts in Dekalb County, this Court suggested that "further proceedings" would be appropriate to determine whether there is "an affirmative commitment to comply in good faith with the entirety of a desegregation plan." 112 S. Ct. at 1450.

The Eighth Circuit's decision here was relatively easy, for the State did not even offer "protestations of an intent to comply in the future." The Eighth Circuit observed both that the State had offered *no* evidence of its good faith (beyond the fact of compliance itself) and that the State's proposal to terminate all support for the *Milliken II* relief in the KCMSD raised a question whether the State had abandoned its former unconstitutional ways that "must first be developed by the district court." App. 11. The State has consistently opposed and continues to oppose, often on contradictory grounds, virtually every aspect of the remedy in this case. The only component of the remedy for which the State is principally responsible, voluntary interdistrict transfers, has never been implemented on a meaningful scale. 93 App. 20 n.10. On appeal, the State argued for the second time that, with the task of desegregation in student enrollment admittedly incomplete and without regard to whether educational vestiges remain unremedied, its responsibility to help to fund teachers, librarians and counselors, and programs

like full-day kindergarten and summer school, should end because, after a century of segregation and decades of neglect, it has begrudgingly complied with court orders for several years. In this context, it is not unusual, and certainly not inappropriate, for the Eighth Circuit to question the State's long term commitment to equal educational opportunities for the plaintiff school children. More importantly, however, this discussion obviously does not create a perpetual remedy and does not raise any new issue not presented in No. 93-1823.

B. The State Failed to Move the District Court for a Declaration of Partial Unitary Status or Even to Attempt to Carry its Burden of Proof on Several Critical Issues, and the Rejection by Both Lower Courts of the State's Argument on Those Fact-Specific Grounds Raises No Issue Meriting This Court's Review That Is Not Also Presented on a Virtually Identical Record in No. 93-1823 in Which This Court Recently Granted Certiorari

As demonstrated above, the first issue raised by the State is a false one. What the State truly attacks here, as in No. 93-1823, are the lower courts' repeated findings that it did not carry its burden of proof with respect to the standards set forth in *Freeman*. But nothing in those findings presents any new issue meriting this Court's review.[11] It is not the Eighth Circuit that misunderstands "the entire concept of unitary status," as Petitioners sug-

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[11] Moreover, the State cannot show—indeed has not even argued—why this Court should abandon its rule against disturbing the findings concurred in by both courts below. This Court has repeatedly held that it will not disturb findings of fact concurred in by both a district court and court of appeals. *See, e.g., Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985); *NCAA* v. *Bd. of Regents*, 468 U.S. 85, 98 n.15 (1987); *Washington Area Transit Auth.* v. *Johnson*, 467 U.S. 925, 928 n.5 (1984); *Rodgers* v. *Lodge*, 458 U.S. 613, 623 (1982). Here, the district court and court of appeals have concurred in *all* of the relevant factual findings on both the *Freeman* issues at least *twice*.

gest, but the State itself. The essence of "unitary status" is not "the cessation of the remedy and the withdrawal of federal court supervision," Pet. 10, but the elimination to the extent practicable of the vestiges of the State-mandated dual school system and the establishment of a school system that provides equal educational opportunities regardless of race. As this Court has made clear, only when the latter, the true essence of unitary status, has been achieved, is the former permissible.

This Court left no doubt that partial relinquishment of judicial control in a school desegregation case is only appropriate "where justified by the facts of the case." *Freeman*, 112 S. Ct. at 1445. The State, however, failed twice in the district court to move for a declaration of unitary status, to allege that this Court's standards for the partial relinquishment of judicial control were met, or even to try to carry its burden of proof with respect to those standards. Instead, the State argued below that the "establishment of the programs by compliance with the court order is all that is required." 93 App. 19. The State limited its evidence to the fact that it had complied with prior court orders by providing part of the funds necessary to enable the District to purchase educational resources such as books, teachers, librarians, and counselors and to offer educational programs such as summer school. The State also compared the resources provided in KCMSD to several neighboring school districts. However, the State presented no evidence that the programs were effective in remedying the harms that they were designed to address.

The State misses one of the fundamental tenets of school desegregation law reaffirmed by this Court in both *Freeman* and *Dowell*. Defendants in school desegregation cases have an affirmative duty to remedy their constitutional violations by eliminating the harms that they have caused:

> The District Court should address itself to whether the Board ha[s] complied in good faith with the de-

> segregation decree since it was entered, *and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable.* [*Freeman*, 112 S. Ct. at 1446 (quoting *Dowell*, 111 S. Ct. at 638) (emphasis added).] [12]

The State, however, did not even allege, let alone attempt to prove, that the educational harms or racial isolation caused by State-mandated segregation in the KCMSD had been eliminated to the extent practicable.[13] The State's evidence in both the 1992 and 1993 *Milliken II* hearings did not mention the "systemwide *reduction* in student achievement," the "low achievement" among minority students, the "general attitude of inferiority among blacks," or the level of racial isolation in KCMSD.[14] *See supra*

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[12] *See Freeman*, 112 S. Ct. at 1443 ("duty . . . to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system"), *id.* at 1445 ("end purpose must be to remedy the violation"); *Board of Education of Oklahoma City v. Dowell*, 498 U.S. at 249-50 ("District Court should address . . . whether the vestiges of past discrimination had been eliminated to the extent practicable").

[13] The State made no such showing; its evidence addressed only the level of certain basic resources but did not address the "quality" or effects of the programs offered in any other way. Indeed, while the State has fully accredited *all* of the other ten school districts in the Kansas City area that it has evaluated—based on the level of educational resources they provide as well as other measures of the quality of their programs—it has only provisionally accredited KCMSD, the State itself finding significant deficiencies in educational quality measures. Testimony of Arthur Rainwater, July 7, 1993 at 23-25. KCMSD's evidence also clearly showed that, while the District has improved its educational quality and desegregation levels, more progress is necessary to put the victims of segregation in the position they would have been but for the constitutional violation. 93 App. 112-13, 131. The District's evidence included, among other things, statistics on student enrollment and historical data on student performance according to a number of indicators.

[14] Unquestionably, the *Milliken II* programs in this case are designed to address the legacy of segregation in all of these areas. *See, e.g., Jenkins*, 639 F. Supp. at 24, 27, 29, 31 (educational pro-

notes 3 and 6. Therefore, the State twice failed to make a record that would allow this Court a meaningful review of whether the KCMSD is partially unitary. In the decision below, the Eighth Circuit held for the second time in a year that "the evidence fell short of establishing that the vestiges of past discrimination had been eliminated to the extent practicable" and that "the State did not try to prove a history of good faith commitment to the whole of the court's decree." App. 6. Even the dissenters from the denial of rehearing *en banc* of the State's first appeal noted that it is "still an open question on the record before us today." *Jenkins*, 19 F.3d at 404; 93 App. 58.[15]

This Court granted *certiorari* on the State's first Petition. The Court has already set an expedited briefing schedule and will have a full opportunity to review the record. Nothing in the record below on this Petition, which is "essentially identical" to that in No. 93-1823, App. 6, or in the decisions below, which rest on the same failures of proof by the State, *id.*, justifies granting another writ or disturbing the schedule for No. 93-1823. Petitioner's brief on the merits in No. 93-1823 is due on November 8, which is only two weeks from now.

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grams ordered in part to remedy educational harms). *See also id.* at 27, 29, 31, and 35 (educational programs ordered will help in "attracting and maintaining non-minority student enrollment").

[15] The State also implicitly challenges the lower courts' legal determination that it is necessary for the district court to retain jurisdiction over the educational programs that the State claims are unitary in order to ensure compliance with the court's decree in other areas that the State concedes are not. *Jenkins*, 11 F.3d at 765; 93 App. 19. This issue too is raised even more directly in No. 93-1823 and does not merit the granting of a second writ. As this Court has recognized, "[t]wo or more *Green* factors may be intertwined or synergistic in their relation, so that a constitutional violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well." *Freeman*, 112 S. Ct. at 1449 (citations omitted). The voluntary remedy here, which requires eliminating the educational vestiges of the violation in order to attract a desegregated student enrollment, is the quintessential example of such synergism.

This case could not be consolidated with No. 93-1823 without disrupting the expedited schedule set in the Court's September 26, 1994 Order in No. 93-1823. Because the issue the State claims is presented in this Petition in fact is not presented by the holding of the courts below and because the State's limited record below adds nothing significant concerning its *Freeman* argument, separate consideration of this Petition by the Court would be wasteful, since the only issues it potentially does raise are also presented in No. 93-1823. The proceedings already in progress in No. 93-1823 will ensure that the lower courts' analysis of these questions will continue to follow the appropriate legal standards.

CONCLUSION

For the foregoing reasons the Petition should be denied or, at most, held pending the disposition of the proceedings on the merits in No. 93-1823.

Respectfully submitted,

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APPENDIX

APPENDIX

[Filed June 30, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

DECLARATION OF TERRANCE A. STEWART

Comes now the Declarant, Dr. Terrance A. Stewart, pursuant to 28 U.S.C. § 1746, and states as follows:

1. I am currently the Assistant Commissioner for Education for Administration with the Missouri Department of Elementary and Secondary Education.

2. I testified before the Court most recently on May 28, 1992. My resume was presented to the Court as State's Exhibit 10 at that time and remains accurate.

3. Currently, I continue to be involved in the monitoring and implementation of the KCMSD remedial components. I review correspondence sent to the District relating to the school desegregation case, review pleadings filed in this case and receive updates and reports on an almost daily basis from the Director of the Desegregation Services section.

4. I have reviewed the Joint Motion of KCMSD and Plaintiffs for Approval of Next Two Years of Milliken II

Desegregation Plan. I submit this declaration in support of the State's response to that motion. I will discuss in the following paragraphs an update of the testimony I gave with regard to the desegregation programs on May 28, 1992.

5. AAA—The KCMSD continues to maintain AAA status, such that the KCMSD has maintained AAA status continuously to the present time since that classification was first awarded to the District in 1987-88. The District has, in fact, exceeded AAA requirements in several areas. Attachment 1 to this declaration demonstrates that all of the suburban school districts have some deficiencies in the library resources they have, while the KCMSD has no deficiencies. The KCMSD also continues to exceed AAA requirements for librarians, and is ahead of most of the surrounding suburban districts in librarians per pupil. See Attachment 1. With regard to counselors per pupil, the KCMSD is ahead of AAA requirements and ahead of most of the suburban districts in most categories of counselors per pupil. See Attachment 2 to this declaration. With regard to art, music and physical education services, the KCMSD meets or exceeds AAA requirements and is ahead of almost all of the suburban districts in art, music and physical education teachers per pupil. See Attachment 3 to this declaration.

6. I continue to believe that the attachment and maintenance of AAA status since the 1987-88 school year has enhanced the level of quality of the educational opportunity available to all students in the KCMSD.

7. Reduced Class Size—I testified at the hearing last year that the Reduced Class Size orders of the Court were fully met in the 1988-89 school year and have been maintained since that time. I have reached the following conclusions regarding class size issues:

A. As pointed out in Attachment 4 to this declaration, in all of the suburban districts used as

comparisons, there are numerous classes that have more than 22 students at the K-3 level.

B. All of the suburban districts used as comparisons have classes with 28 or more students at the grade 4-6 level. See Attachment 5 to this declaration.

C. All of the suburban districts have teachers who have class loads greater than 125 per teacher at the high school level. See Attachment 6 to this declaration. The average teacher load in these districts for grades 9-12 is higher than the KCMSD's average teacher load of 78.83.

8. It continues to be my opinion, that the attainment and maintenance of the Reduced Class Size goals of the remedy since the 1988-89 school year has enhanced the level of quality of educational opportunities available to all students in the KCMSD. By establishing the reduced class sizes, the opportunity for desegregative educational opportunities has been provided and maintained since the class size goals were met.

9. Full-Day Kindergarten—Once again, all of the suburban comparison districts offer only half-day kindergarten. The KCMSD services 3,409 kindergarten students. In my opinion, provision of the full-day kindergarten program to KCMSD students since 1985-86 has enhanced the quality of educational opportunity available in the District and has provided desegregative opportunities to the KCMSD.

10. Extended Day—In my opinion, the continued existence of the Extended Day program beginning in the 1985-86 school year (as the Before and After School Tutoring Program) has enhanced the level of quality of educational opportunity for students in the Kansas City, Missouri School District. The existence of that program on a continuing basis has provided the opportunity for retention and attraction of non-minority students.

11. Summer School—Attachment 7 to this declaration shows summer school enrollment in the KCMSD and 11 suburban districts near the KCMSD. The exhibit demonstrates that the KCMSD once again had the highest summer school participation rate of these districts for the 1991-92 school year. In my opinion, the operation of the summer school program since 1985 has provided an opportunity for students in the KCMSD to obtain an enhanced level of quality of education, and has provided desegregative opportunities to the KCMSD. The opportunity for remediation has also been provided.

12. Early Childhood—In my opinion, the continued availability of the Early Childhood program since 1986-87 has enhanced the quality of educational opportunity in the KCMSD.

13. Effective Schools—In my opinion, as I testified last year, the availability of the Effective Schools program has enhanced the quality of educational opportunity in the KCMSD over the quality that was available before the Effective Schools program started in the 1985-86 school year. The availability of this program has also enhanced the opportunity of the KCMSD to increase the amount of desegregation within the school district. There is no Effective Schools program as such in any of the surrounding school districts.

14. I also continue to believe that the year IX-X programs should be considered to be fully implemented. The fact the KCMSD has not met a goal of 60% minority/40% non-minority and has not met national norms for achievement testings does not alter the fact that the programs cited here have been fully implemented. Tr. 5/28/92 at 498-99.

I swear the foregoing is true and correct to the best of my knowledge and belief.

/s/ Terry Stewart

Executed an June 28, 1993